PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ASSAULT.

The Court of Criminal Appeals of Texas decides in *Chambless* v. *State,* 79 S. W. 577, that where a man without the consent of a woman and by the use of force attempts to make her kiss him, he is guilty of an assault; but where he reasonably believes, under the circumstances, that she would allow him to kiss her, and merely attempts to kiss her by consent, intending no force, he is not guilty. This rather amusing result seems to embody an important principle. Compare a decision of the same court made very recently in *Stripling* v. *State,* 80 S. W. 376.

Kisses

BANKS.

In *Continental National Bank of Memphis, Tenn.,* v. *First National Bank of West Point,* 36 S. 189, the Supreme Court of Mississippi decides that where a bank forwards checks for collection to its correspondent under a general indorsement in blank, and the correspondent in turn sends them under a like indorsement to a third bank, which, pursuant to the course of uniform dealing existing between it and the correspondent, applies the proceeds to the correspondent's account, without any knowledge of the insolvency of the correspondent or of the claim of the initial bank, it cannot be required to again account to the initial bank for the proceeds of the collection, since the initial bank by forwarding the collections under an unlimited indorsement divested itself of ownership, and retained simply the right to look to its correspondent for payment. See the recent decision of *American Exchange National Bank* v. *Theummler,* 195 Ill. 90.

Collections: Unlimited Indorsement

BANKS (Continued).

The Supreme Court of Kansas holds in *Kimmel* v. *Bean*, 75 Pac. 1118, that a bank which receives from an agent for deposit in his own name the money of his principal, without notice of the agency, is protected, in applying it to a past-due debt of the depositor, to the same extent as in paying it out upon his checks whenever such application is authorized by the agent, either expressly or by legal implication, and such authority ordinarily arises from the making of a deposit, without other directions, where the debt to which it is applied is an overdraft. See also in connection with this case the decision in *Cady* v. *South Omaha National Bank*, 46 Neb. 756, where a somewhat inconsistent result was reached.

Deposit by Agent

BANKRUPTCY.

The Supreme Court of the United States decides in *Charles A. Tinker* v. *Frederick L. Colwell*, 24 S. C. R. 505, that a judgment for damages for criminal conversation is one recovered in an action "for wilful and malicious injuries to the person or property of another" within the meaning of the provision of the bankruptcy act of July 1, 1898, excepting judgments recovered in such actions from the operation of a discharge in bankruptcy. Compare *Macfadzen* v. *Olivent*, 6 East 387.

Effect of Discharge

The Supreme Court of Nebraska holds in *Cleland* v. *Anderson*, 98 N. W. 1075, that a right of action for tort is not property within the meaning of the national bankruptcy act; and, even though an action is pending thereon, such right does not pass to the trustee in bankruptcy. Applying this rule, it is decided, with one judge dissenting, that an action for conspiracy, whereby plaintiff was "driven out of business as a dealer in lumber," is an action in tort, and does not arise "from the unlawful taking or detention of, or injury to, his property" within the meaning of the federal bankruptcy act.

Property: Torts

BUILDING RESTRICTIONS.

Construction

The general rule that a building restriction must be construed strictly is applied in a somewhat striking way in the case of *Crofton* v. *St. Clement's Church,* 57 Atl. 570, where the Supreme Court of Pennsylvania decides that where a deed provided that no dwelling should be erected on the rear end of a lot, and the rear end of the lot was on the north side of a street thirty-four feet wide, an erection of a building, no portion of which was within ten feet of such north side of the street, was not on the rear end of the lot. It is further held that the words " dwelling house," which kind of building was prohibited by the restriction, do not include a building attached to a church containing living-rooms, bed-rooms, and studies for the clergy, and also rooms for the guilds and various organizations of the church.

CARRIERS.

Free Pass: Limitation of Liability

The Supreme Court of the United States, which has consistently adhered to the rule that a passenger upon a free pass may release the railroad company from liability even for negligence (see *Northern Pacific Railway Company* v. *Adams,* 192 U. S. 440), extends this principle by holding in *John D. Boering* v. *Chesapeake Beach Railway Company,* 24 S. C. R. 515, that a stipulation in a free railway pass requiring the user to assume the risk of injury due to the carrier's negligence is binding on a person accepting the privilege, although notice of such stipulation may not have been brought home to her.

CONSTITUTIONAL LAW.

Interstate Commerce

It is decided by the Supreme Court of Mississippi in *Adams* v. *Mississippi Lumber Co.,* 36 S. 68, that a statute imposing a privilege tax on each land, timber, mill company or individual, providing the section shall not apply to sawmill operators who do not ship timber or lumber out of the state, is invalid as a tax on interstate commerce. It is further held that such tax is lacking in uniformity. With the first holding should be compared the decision of the United States Supreme Court in *Geer* v. *Connecticut,* 161 U. S. 519.

CONSTITUTIONAL LAW (Continued).

The Court of Appeals of Kentucky decides in *City of Louisville* v. *Wehmoff,* 79 S. W. 201, that a city ordinance forbidding the transmission to a pool-room operator of messages intended to be used in the business of pool selling in the city is a valid exercise of the police power of the state, and further holds that an ordinance forbidding transmission of such messages to pool-rooms is not an unconstitutional regulation of interstate commerce, though the telegrams come from another state. With this case should be compared the case of *Western Union Telegraph Co.* v. *James,* 162 U. S. 650.

Policy Power: Interstate Commerce

In *Goodrich* v. *Mitchell,* 75 Pac. 1034, the Supreme Court of Kansas decides that a law which provides that those who have served in the army and navy of the United States in the War of the Rebellion, and have been honorably discharged therefrom, shall be preferred for appointment to office in every public department and upon all public works of the state and of the cities and towns thereof is constitutional. With this case compare *State* v. *Garbroski,* 111 Iowa 496, which on its facts is against the validity of preference of veterans.

Preference of Veterans

A law of Utah passed in 1901 provided that a sale of any portion of a stock of merchandise out of the ordinary course of trade, or a sale of an entire stock in bulk, is fraudulent and void as against creditors of the seller unless an inventory as prescribed is made five days before the sale, and all the creditors of the seller of which the purchaser has or may obtain knowledge by reasonable diligence shall have been notified thereof; and another section makes the violation of the previous section a misdemeanor. Under these facts the Supreme Court of the state decides in *Block* v. *Schwartz,* 76 Pac. 22, that such act was unconstitutional, as depriving a merchant owing debts of his liberty to contract, amounting to a deprivation of property without due process of law. A very satisfactory review of the principles involved is made by the court. The general principles involved are, of course, well known, but their application in this case seems an important one.

Sales in Bulk

CONTRACTS.

In *Baxter* v. *Deneen,* 57 Atl. 601, the facts were that A entered into a gambling contract with B, a bucket-shop dealer, on the rise and fall of stocks, putting up margins with B, who agreed to keep enough money in the bank to liquidate claims. Under these circumstances the Court of Appeals of Maryland holds, with one judge dissenting, that equity would not lend its aid to compel performance of the agreement by enjoining B's withdrawal of money from the bank, although he intends to remove it from the state and cheat A. Compare the Pennsylvania decision of *Dauler* v. *Campbell,* 35 Atl. 857, and *Gough* v. *Pratt,* 9 Md. 526.

Gambling: Relief in Equity

CORPORATIONS.

In *Thorst* v. *Lewis,* 98 N. W. 1046, the Supreme Court of Nebraska decides that a brewing corporation may become liable as surety upon a liquor license bond executed by it to induce the licensee to lease a building from it and deal exclusively in its products.

Acting as Surety

It is decided by the Court of Chancery of New Jersey in *Public Service Corp.* v. *American Lighting Co.,* 57 Atl. 482, that a foreign corporation having no franchise within the state, being neither a citizen nor a householder thereof, the sole business of which is the furnishing of a patent gas burner, has no standing in its own right to demand and receive a supply of gas from a domestic corporation for any purpose whatever.

Public Service: Rights of Foreign Corporations

EMINENT DOMAIN.

In *Town of Hazlehurst* v. *Mayes,* 36 S. 33, the Supreme Court of Mississippi holds that where a city was operating under a law which grants municipalities authority to exercise full jurisdiction over the streets, and to light the same and to provide for the erection of lamp-posts, the city had a right to trim trees standing between the sidewalk and a public highway to any degree necessary to prevent interference with the wires of a lighting

Cutting Trees

EMINENT DOMAIN (Continued).

plant erected by the city, and without compensation to the abutting owner. Compare *Vanderhurst* v. *Tholcke,* 113 Cal. 147.

Fishing Rights

Against the dissent of two judges the Court of Errors and Appeals of New Jersey decides in *Albright* v. *Sussex County Lake and Park Commission,* 57 Atl. 398, that the right to fish in an inland lake in New Jersey cannot be separated from the ownership of the lake and taken under the power of eminent domain, because, first, the natural supply of fish therein is so small as to be incapable of meeting a public demand; and, second, the object of acquiring such a right is not use, which implies utility, but mere sport or pastime. The following question is raised, but not answered: Is the value of such a right capable of estimation, so that a compensation may be awarded therefor which shall be just with respect both to the private owner and to the public purchaser? See also *Albright* v. *Cortright,* 64 N. J. Law, 330.

EXECUTORS.

Powers: Gas: Petroleum

A resident in Ohio, owning in Kansas a farm that had never been used for other than agricultural purposes, executed a will therein providing that the executor and trustee should take charge of said premises and "lease and maintain the same in good condition, with a view to obtain the best income therefrom, without permitting the same to deteriorate in value or quality." Under these facts the Supreme Court of Kansas decides in *Lanyon Zinc Co.* v. *Freeman,* 75 Pac. 995, that the executor and trustee was not by said will authorized to execute an oil and gas lease granting to the lessee all the oil and gas under said premises and to bind the legatees thereby. Petroleum and gas, it is said, are minerals. So long as they remain in the ground they are a part of the realty and cannot be disposed of except under a specific power or a power which gives the right to dispose of the realty. In connection with this case the decision in *Wilson* v. *Youst,* 43 W. Va. 826, is worthy of note.

EXECUTORS (Continued).

In *Currier* v. *Clark*, 75 Pac. 927, the Court of Appeals of Colorado holds that an agreement of an executor with beneficiaries to resign for a consideration is illegal as against public policy, making invalid the notes given as the consideration. Compare *Ellicott* v. *Chamberlain*, 38 N. J. Eq. 604.

Resignation: Public Policy

FOREIGN CORPORATIONS.

In *Sigel-Campion Live-Stock Commission Co.* v. *Haston*, 75 Pac. 1028, the Supreme Court of Kansas decides that isolated, independent transactions in the state incidentally necessary to the business of a foreign corporation, conducted at its domicile, fully completed before action commenced, will not prevent recovery in the courts of the state by such corporation when no repetition of such acts is in contemplation, and the territory of the state is not being made the basis of operations for the conduct of any part of the corporation's business at the time the suit is begun. See *Thomas* v. *Remington Paper Co.*, 73 Pac. 909.

Action by: Doing Business

GIFTS.

In *Davis* v. *Seaboard Air-Line R. Co.*, 46 S. E. 515, the Supreme Court of North Carolina decides that where, in an action against a railroad company for killing a cow, plaintiff testified that though he purchased the cow with his own money he gave her to his wife, and placed metal tags in the cow's ear with his wife's name stamped on them; that the cow ran on the farm, which belonged to the wife, with the plaintiff's other cattle, and that, notwithstanding the wife accepted the gift, plaintiff regarded the cow as belonging to both him and his wife—whether there was a completed gift of the cow to the wife, so as to vest the title in her, was properly submitted to the jury. One judge dissents, holding that as a matter of law such facts show a completed gift.

What Constitutes

GUARDIAN AND WARD.

In *Trumbull* v. *Trumbull,* 98 N. W. 683, the Supreme Court of Nebraska, holding that the rights of guardian and parents are the same with reference to advice as to separation by the ward from husband or wife, decides that the presumption is that the advice was given in good faith, and that in a suit for damages for alienation of affections it is a good defence, on the part of a guardian, that he advised the ward from honest motives, in a sincere belief that the advice given was for the moral and social good of the ward. See *Reed* v. *Reed,* 33 N. E. 638.

Alienation of Affection

HUSBAND AND WIFE.

The United States District Court (Eastern District of Pennsylvania) decides *In re Domenig,* 128 Fed. 146, that the Pennsylvania statute of 1893 (P. L. 345, Sec. 3), providing that a wife may not sue her husband except for divorce or for recovery of her separate property after his desertion, does not prevent her from proving a claim against his estate in bankruptcy, which is not a proceeding against him nor even adverse to him. It is also held that the Pennsylvania statute of 1887 (P. L. 158, Sec. 2b), which forbids husband and wife to testify "against each other," does not render the testimony of a wife incompetent in support of a claim filed by her against her husband's estate in bankruptcy. See in connection with this case *Nuding* v. *Urich,* 169 Pa. 289.

Bankruptcy: Witnesses

The Supreme Court of Pennsylvania, holding that a husband may make a valid gift to his wife by transferring an account to her name, though she knows nothing of the transaction at the time, holds that where a husband transferred an account with certain stock-brokers from his own name to that of his wife, and the brokers made the transfer on their books and thereafter sold the securities in an action for a debt of the husband without notice to the wife or to the husband, who was managing her account, the wife could sustain trover therefor: *Sparks* v. *Hurley,* 57 Atl. 364. See also Roberts's Appeal, 85 Pa. 84.

Gifts: Trover

INJUNCTIONS.

A railroad company is entitled to injunction to restrain ticket brokers from buying and selling tickets issued by it to persons who, in consideration of reduced rates, have contracted not to transfer the same, the non-transferability being stated on their face: United States Circuit Court (Eastern District of Louisiana) in *Louisville and N. R. Co.* v. *Bitterman,* 128 Fed. 176.

Ticket Brokerage

JOINT TORT FEASORS.

The Court of Appeals of Kentucky decides in *Louisville and Evansville Mail Co.* v. *Barnes's Adm'r,* 79 S. W. 261, that the acceptance by one, who has a cause of action against two joint tort feasors, of a sum of money from one of them in part satisfaction and in consideration of a release of the tort feasor making the payment does not preclude recovery against the other. Compare *Snow* v. *Chandler,* 10 N. H. 92.

Release of One: Effect

JUDGMENTS.

The Supreme Court of Kansas decides in *Clevenger* v. *Figley,* 75 Pac. 1001, that in an action to foreclose a mortgage given by the owner of land jointly with the guardian of his insane wife the District Court has jurisdiction to determine whether or not the premises were a homestead at the time the mortgage was executed, and to decide whether or not the instrument expressed the joint consent of husband and wife; and a judgment involving an erroneous decision of those matters is not open to collateral attack, but is valid and binding upon the parties and their privies until corrected in a direct proceeding for that purpose. The case presents a very careful review of the authorities in point. With it should be compared the decision in *Watkins Land and Mortgage Co.* v. *Mullin,* 62 Kan. 1.

Collateral Attack: Jurisdiction

LANDLORD AND TENANT.

In *Ehinger* v. *Bahl,* 57 Atl. 572, it appeared that a tenant from month to month notified his landlord of a crack in the wall of the building, and that he would move if it were not repaired. The landlord promised to repair, but failed to do so, and the building fell, injuring the tenant's property. It is decided by the Supreme Court of Pennsylvania that the tenant had a right of action against the landlord, the general principle being laid down that where a landlord fails to make repairs as promised, and in consequence the building falls and damages the tenant's property, the landlord is liable.

Repairs: Action by Tenant

In *Oppenheimer* v. *Clunie,* 75 Pac. 899, the Supreme Court of California holds that a lessee of a theatre will be held to have acquiesced in the lease after the knowledge of the facts, and so is not entitled to rescind it for fraudulent representations of the lessor that the exits and stairways were sufficiently large and in the proper places for emptying the theatre, he having taken possession and used it a season before attempting to rescind. It is further decided that the report of a grand jury as to the unsafe condition of a theatre is hearsay and not admissible in an action to rescind a lease of the theatre. With the first decision compare *Colton* v. *Stanford,* 82 Cal. 399.

Rescission of Lease

LIMITATIONS.

In *Linck* v. *Linck,* 79 S. W. 478, the St. Louis Court of Appeals of Missouri decides that under the Missouri law exempting married woman from the operation of the Statute of Limitations during coverture, the statute does not run against a wife's right of action for alienation of her husband's affection until termination of the coverture.

Married Woman: Alienation of Affection

MORTGAGES.

In *Kennedy* v. *Gibson,* 75 Pac. 1044, it is decided by the Supreme Court of Kansas that where a promissory note provides that default in the payments of interest shall mature the whole debt at the option of the holder, and a mortgage given to secure payment of the note provides that defaults shall mature the debt, but makes no mention of an option in the holder, the provision in the note will control. See *Hutchinson* v. *Benedict,* 49 Kans. 545.

Construction: Option in Note

MUNICIPAL CORPORATIONS.

In *Fox* v. *City of Philadelphia,* 57 Atl. 356, the Supreme Court of Pennsylvania decides that where a city operates an elevator in a public building, which building was at the time of the accident in the control of the city, and where the elevator was used in carrying the public to the courts, the city is liable to a passenger injured by the negligence of the operator, and the rule applicable to common carriers, that the happening of an accident to a passenger raises *prima facie* a presumption of negligence on the part of the carrier, applies. Compare *McClain* v. *Henderson,* 187 Pa. 283, and *Hartford Deposit Co.* v. *Sollitt,* 172 Ill. 222.

Elevators: Liability

The Supreme Court of Rhode Island decides in *Fox* v. *Clarke,* 57 Atl. 305, that a bicycle rider is not entitled to recover for injuries sustained by reason of a defect in the street where the defect would not have caused injury to an ordinary traveller. Compare *State* v. *Collins,* 16 R. I. 371, where it was held that a bicycle was a vehicle within the meaning of a statute requiring one travelling on a highway with "any carriage or other vehicle" to turn to the right. The practical bearing of the above decision is, of course, very important. Another very recent decision, *City of Louisville* v. *Keher,* 79 S. W. 270, is of special interest in this connection.

Streets: Defects: Bicycles

NEGLIGENCE.

In *Saylor* v. *Parsons,* 98 N. W. 500, the Supreme Court of Iowa holds that one who seeks to rescue another from imminent danger, thereby imperilling his own life, is not, as a matter of law, guilty of contributory negligence. The recent case in Pennsylvania of *Corbin* v. *Philadelphia,* 195 Pa. 461, where the Supreme Court in a divided opinion reached the same conclusion, will be recalled.

Contributory Negligence

PARENT AND CHILD.

In *Aycock* v. *Hampton,* 36 S. 245, the Supreme Court of Mississippi holds that the putative father of a bastard child, who is able to take care of and support it, is entitled to its custody after the death of the mother. There seems to be not much authority in this country on this question. See, however, *Commonwealth* v. *Anderson,* 1 Ashm. 55.

Custody

In *James* v. *Aller,* 57 Atl. 476, the Court of Chancery of New Jersey decides that a gift by a father to his children of his entire property remaining after previous transfers to them, and constituting the balance of his savings, made without any advice when his second wife, who had separated from him, was threatening him with legal proceedings for support, and containing no power of revocation and without any provision for his future support, may be revoked, though executed without any undue influence of the children. But it is further held, on the other hand, that where a father has executed a gift of property to his children, and they have received the income, relying on the gift of it, and have expended it mainly as the father directed, on the revocation of the gift the income cannot be recovered.

Gifts: Revocation

PARTITION.

In *Sumner* v. *Early,* 46 S. E. 492, the Supreme Court of North Carolina holds that where tenants in common of one tract of land and tenants in common of another mutually agreed that all the lands should be partitioned "as if they held the said lands as tenants in common," the remedy on the refusal of the tenants in com-

Specific Performance

PARTITION (Continued).

mon of one of the tracts to carry out the agreement is by suit for specific performance, and not by a special proceeding for partition, the agreement being executory only.

STATUTE OF FRAUDS.

Agreement in Consideration of Marriage

In *Steen* v. *Kirkpatrick,* 36 S. 140, the Supreme Court of Mississippi holds that an agreement is not within the Statute of Frauds, as "upon consideration of marriage" where it is made after the contract to marry has become binding, though it is in contemplation of marriage. See 1 Bishop Married Women, Sec. 806; *Rainbolt* v. *East,* 56 Ind. 538.

TAXATION.

Non-Resident Express Company: Mileage Basis

The method of taxation adopted where a corporation is doing a business both intrastate and interstate is considered in *James C. Fargo* v. *William H. Hart,* 24 S. C. R. 498, where the Supreme Court of the United States holds that personal property owned by a non-resident express company and situated outside the state cannot be taken into account in fixing the value, for taxation, of its property within the state, on a mileage basis, on the theory that it gave the credit necessary for carrying on the business in the state, where the resulting assessment is greatly in excess of the value of the total good-will of the company, measured by the difference between its tangible assets and the total value of its stock. See in connection with this case *Maine* v. *Grand Trunk Railway Company,* 142 U. S. 217. It is further held that tender is not a prerequisite to injunctive relief against an assessment for taxation made upon unconstitutional principles.

USURY.

Payment of Independent Debt

The Court of Civil Appeals of Texas decides in *Southern Trading Co.* v. *State National Bank of Ft. Worth,* 79 S. W. 644, that the fact that a borrower, in order to secure a loan, agrees to pay not only legal interest, but also a judgment on which he and the lender are liable, does not render the loan usurious, even though the judgment is one on which contribution could not be enforced. Compare *Campion* v. *Kille,* 14 N. J. Eq. 232.

WITNESSES.

Competency: Husband and Wife

In Delaware the rule of the common law prevails that a wife may not testify in behalf of her husband in a criminal proceeding. Recognizing this rule, the Court of General Sessions of Delaware decides in *State* v. *Smith,* 57 Atl. 368, that the wife of one of two defendants jointly indicted for larceny is a competent witness for the defendant who is not her husband. It is therefore held that a severance will not be granted to one of two defendants jointly indicted for larceny on the ground that the wife of the other defendant is an important witness for the defendant asking the severance. See in connection with this case *The United States* v. *Awdatte,* 6 Blanchf. 76.

Physicians

The New York law similar to the law in most states prohibits disclosure by a physician of professional information acquired while he is acting in a professional capacity and where such information is necessary to enable him so to act. In *Meyer* v. *Supreme Lodge K. P.,* 70 N. E. Ill., the Court of Appeals of New York holds that this provision applies where a physician is called to treat a patient against the will of the patient. The case is carefully discussed on both sides, there being two dissenting justices and one dissenting opinion. See and compare *People* v. *Sliney,* 137 N. Y. 570, where it is held that when a physician is sent by a prosecuting officer to make a report upon the sanity of a prisoner, if he does not treat or prescribe for the subject, statements of the latter are not protected.